



I declare under penalty of perjury that I am employed by the City of Chula Vista in the office of the City Clerk and that I posted the document according to Brown Act requirements.

Dated: 3/16/15 Signed: D. Norr

City of Chula Vista Boards & Commissions

Board of Ethics

Agenda

Notice is hereby given that the Board of Ethics of the City of Chula Vista has called and will convene a Special Meeting of the Board of Ethics on Thursday, March 19, 2015, at 5:15 p.m. in Council Chambers, located at 276 Fourth Avenue, Building A, Chula Vista, California to consider the item(s) on this agenda.

SPECIAL MEETING OF THE BOARD OF ETHICS OF THE CITY OF CHULA VISTA

March 19, 2015
5:15 p.m.

Council Chambers- Building A
276 Fourth Avenue
Chula Vista, CA

CALL TO ORDER

ROLL CALL: Commissioners: Toothman____; Jemison____; Esquer____;
Livingston____; Robles____; and Chair Schilling____.

CITY STAFF: James Lough, Esq., Outside Counsel

PUBLIC COMMENTS

Persons speaking during Public Comments may address the Board/Commission on any subject matter within the Board/Commission's jurisdiction that is not listed as an item on the agenda. State law generally prohibits the Board/Commission from discussing or taking action on any issue not included on the agenda, but, if appropriate, the Board/Commission may schedule the topic for future discussion or refer the matter to staff. Comments are limited to three minutes.

ACTION ITEMS

The Item(s) listed in this section of the agenda will be considered individually by the Board/Commission and are expected to elicit discussion and deliberation. If you wish to speak on any item, please fill out a "Request to Speak" form and submit it to the Secretary prior to the meeting. Comments are limited to five minutes.

1. Discussion and Action Regarding Selection of Outside Counsel to Advise Board of Ethics in BOE complaints 2-18-15A and 2-20-15A, Including Using List of Attorneys That Had Been Selected by BOE to Serve as the Enforcement Authority under Chula Vista Municipal Code section 2.52 (Campaign Contribution Ordinance) to Select Attorney to Serve as Outside Counsel*

** This item was approved at the March 11, 2015 Board of Ethics Meeting. The approved item improperly listed one case number as 2-20-15B. Approval of this item will correct the typographical error to properly list the case as number 2-20-15A.*

2. Discussion and Action regarding the "Prima Facie Review," pursuant to Chula Vista Municipal Code section 2.28.110, of Ethics case numbers 2-18-15A and 2-20-15A

OTHER BUSINESS

3. STAFF COMMENTS
4. CHAIR'S COMMENTS
5. COMMISSIONERS'/BOARD MEMBERS' COMMENTS

ADJOURNMENT to a date to be determined or the regular meeting on April 15, 2015, in the Council Conference Room C101, Building A at 276 Fourth Avenue, Chula Vista, California.

Materials provided to the Board of Ethics related to any open-session item on this agenda are available for public review in the Office of the City Attorney at 276 Fourth Avenue, Chula Vista, Building A, Chula Vista during normal business hours.

In compliance with the AMERICANS WITH DISABILITIES ACT

The City of Chula Vista requests individuals who require special accommodations to access, attend, and/or participate in a City meeting, activity, or service, contact the Human Resources Department at (619) 691-5041 (California Relay Service is available for the hearing impaired by dialing 711) at least forty-eight hours in advance of the meeting.



15 TIME STAMP
FEB 18 A10:32

CITY OF CHULA VISTA
CITY CLERK'S OFFICE

COMPLAINT FORM

[illegible]

request
I formally ^{request} that the appointment of Mr. Miesen to the City Council be reviewed by the State Attorney General (or outside counsel if appropriate). The State AG traditionally rules and opines on issues that appear to suggest conflicts of interest as described in California Code 1090. It strongly appears that Miesen has 1090 issues that would be better resolved by the State AG. As noted in La Prensa in a recent editorial:

"The City Attorney, Glen Googins, took a very narrow view, looking at only the financial disclosure form, and stated that because the city contract with Republic Services, where Miesen serves as Division Manager, would not come up in the next two years, that he was good to go."

The City Attorney was remiss in not looking deeper into the entire relationship that Miesen has been in with the City including but not limited to Miesen's ownership status in Republic Waste. He is a Division Manager of Republic Services, the sole provider of trash pick-up, recycling, and management of a landfill on public lands. Republic Services is considered a PUBLIC/PRIVATE partnership. That means they are a private contractor that has been outsourced to provide a city service. This would be similar to Sweetwater Authority, a public agency that serves the needs of the city. A water district and an elected office was cited in an example of incompatible offices which "presented a significant potential for a clash of duties and loyalties..."

As pointed out significantly by La Prensa: "Because Miesen is simultaneously serving as the head of a public private partnership and as an appointed city council person whose job it is to oversee the outsourcing contract, the Miesen appointment would fall under the Common Law doctrine prohibiting "self-dealing", the statutes relating to incompatible offices (offices referring to public offices as well as positions of authority in other organizations), and California Law, section 1090. According to the Attorney General, "Section 1090 essentially prohibits a public official from being financially interested in a contract in both the official's public and private capacities." Miesen not only owns shares of Republic Waste, but he also collects a substantial salary as Division Manager.

Further Googins may have neglected to refer to the following: Chapter XIV. CODE OF ETHICS Government Code Section 8920 et seq., which in part states: E. Potential Conflict in Duties or Functions - The incompatible offices prohibition does not require proof of an actual clash between the two offices in the context of a particular decision. It is enough that there is potential for a significant clash between the two offices at some point in the future.

And then there is the problem of significant political contributions that Mr. Miesen and Republic/Allied Waste have made to elected officials most notably the City Attorney, Mayor and Councilmembers. If form 460's show that political contributions have been made from Miesen and his company to current sitting city officials, it would seem that these 460 filings should have been revealed prior to the nomination consideration of Miesen. It would seem that ethics considerations should have immediately come into play with recusals from each official that received political contributions from Miesen and all officials from Republic/Allied. Therefore, Mr. Miesen may have never been nominated if such responsible actions had taken place prior to his consideration. The appearance of Miesen gaining appointment because he politically contributed to the "right people" certainly sends the wrong message about Chula Vista and destroys the credibility of the entire appointment process and suggests the office of City Councilmember is "for sale".

BOE complaint # 2-20-15A

Page 1



RECEIVED

TIME STAMP

15 FEB 20 09:55

CITY OF CHULA VISTA
BOARD OF ETHICS

CITY OF CHULA VISTA
CITY CLERK'S OFFICE

COMPLAINT FORM

Please print or type. This form may be completed and filed with the City Clerk at 276 Fourth Avenue, Chula Vista, CA 91910. See reverse side of form for additional information.

COMPLAINANT'S NAME	Helen PROSSER	DAYTIME PHONE	[REDACTED]
COMPLAINANT'S ADDRESS	[REDACTED] CITY [REDACTED] ZIP 91911	ALTERNATE PHONE	[REDACTED]
LOCATION OF INCIDENT	Chula Vista City HALL	DATE AND TIME OF INCIDENT	01/13/15
NAME OF CITY OFFICIAL(S)	STEVE Miesen, MARY SALAS, Pamela Bensoussan, John McCANN,		
NARRATIVE OF COMPLAINT	PAT AGUILAR, GLEN GOOGINS, SIMON SILVA		
I object to the STEVE Miesen City Council appointment and think that it VIOLATES CALIFORNIA CONFLICT OF INTEREST AND COMMON LAW AND INCOMPATIBLE OFFICE STATUTES.			
THE following specific code violation is the basis for my complaint: section 2.01.030 (C):			

13. No City official shall negotiate for employment with any person, firm, or organization at the same time that aforementioned person, firm, or organization has a matter pending before City Council, board or commission, or a City department and upon which the City official must act or make a recommendation. (Ord. 3264 § 1, 2013).

Since Steve Miesen is the Division Manager of Republic Waste and his company has ongoing business with the city's finance department, I believe Steve Miesen will definitely have a "conflict"

CONTINUED ON ADDITIONAL SHEETS ☒

CERTIFICATION:

I declare that the statements made on this form, as well as any attached statements of my own, are true and correct to the best of my knowledge and belief. This declaration is made under penalty of perjury, under the laws of the State of California.

Signed: Helen Prosser

Date: February 20, 2015

CONTINUED

Page 2



TIME STAMP

**CITY OF CHULA VISTA
BOARD OF ETHICS**

COMPLAINT FORM

Please print or type. This form may be completed and filed with the City Clerk at 276 Fourth Avenue, Chula Vista, CA 91910. See reverse side of form for additional information.

COMPLAINANT'S NAME <i>Helen PROSSER</i>		DAYTIME PHONE ()
COMPLAINANT'S ADDRESS CITY	ZIP	ALTERNATE PHONE ()
LOCATION OF INCIDENT		DATE AND TIME OF INCIDENT
NAME OF CITY OFFICIAL(S)		
NARRATIVE OF COMPLAINT <i>continued from Page 1</i>		
<i>OF INTEREST" with regard to matters of Republic Waste AND THE people of Chula Vista. The city council must MAKE DECISIONS ON placing liens ON default TRASH COLLECTION Bills. Who will Steve represent? The citizens of Chula Vista OR the WASTE company he MANAGES?</i>		
<i>I believe it is in the best interest of the citizens of Chula Vista to have Steve Miesen's appointment to the Chula Vista City Council REVOKED!</i>		
<i>I ALSO think that the CITY ATTORNEY AND HIS STAFF, AS WELL AS THE CURRENT City Council should recuse themselves from Testifying in an examination of the legality of the Miesen appointment due to their own PERSONAL bias, acceptance of CAMPAIGN CONTRIBUTIONS,</i>		
<i>AND other gifts AND friendships.</i>		
CERTIFICATION: <input type="checkbox"/> CONTINUED ON ADDITIONAL SHEETS		
I declare that the statements made on this form, as well as any attached statements of my own, are true and correct to the best of my knowledge and belief. This declaration is made under penalty of perjury, under the laws of the State of California.		
Signed: <i>Helen Prosser</i>		Date: <i>February 20, 2015</i>

Chapter 2.01**CODE OF ETHICS****Sections:**

- 2.01.010 Establishment of the code of ethics.
- 2.01.020 Application of the code of ethics.
- 2.01.030 Code of ethics.
- 2.01.040 Severability.

2.01.010 Establishment of the code of ethics.

Public office is a public trust and City officials shall exercise their public duties in a manner that preserves that trust. The public's trust can best be preserved if City officials adhere to a high standard of ethics that transcends the standards prescribed by law. High ethical standards require that all City officials understand and avoid unethical behavior. Unethical behavior can develop in a variety of situations, but it occurs when the public interest is not the sole and paramount interest in all actions conducted by all City officials. The purpose of this chapter is to encourage the highest standards of behavior by City officials, increase public confidence in City officials, to identify and take appropriate action with respect to unethical behavior, and to assist City officials with decision-making in areas of ethical concern. Accordingly, the code of ethics is hereby established. (Ord. 3264 § 1, 2013).

2.01.020 Application of the code of ethics.

The code of ethics shall apply only to City officials. "City officials" shall mean members of the Chula Vista City Council, including the Mayor, the City Manager, the City Attorney, the City Clerk, board members and commissioners, Assistant City Managers, City department heads, as well as ex-City officials who were subject to this chapter. The Board of Ethics shall investigate violations of the code of ethics as set forth in Chapter 2.28 CVMC. (Ord. 3264 § 1, 2013).

2.01.030 Code of ethics.

The code of ethics is divided into two areas: guiding principles, as set forth in subsections (A) and (B) of this section, and specific prohibitions, as set forth in subsection (C) of this section. The guiding principles are intended to provide a set of principles from which City officials can draw upon to assist them in conducting the public's business. As such, the guiding principles are directory in nature and not subject to the complaint procedures set forth in CVMC 2.28.090 through 2.28.150. The specific prohibitions are actions that City officials

shall not engage in, and, as such, are subject to the complaint procedures set forth in CVMC 2.28.090 through 2.28.150.

A. Guiding Principles. The public judges its government by the way City officials conduct themselves in the posts to which they are elected or appointed. All City officials should conduct themselves in a manner that will tend to preserve public confidence in, and respect for, the government they represent. The purpose of these guiding principles is to encourage the highest standards of behavior by City officials, transcending the standards required by law; increase public confidence in the City officials that serve the public; and assist City officials with decision-making in areas of ethical concern. City officials, in the performance of their duties, should strive to adhere to the following guiding principles:

1. City officials are agents of public purpose and hold office for the benefit of the public. As such, City officials have a duty to act in the best interests of the public. City officials must strive to protect the public's resources through diligent and judicious management.

2. City officials should not engage in, permit, or condone fraud, but should be proactive to identify fraud and seek to correct the causes that lead to the fraud. Fraud in public service includes, but is not limited to, making false or misleading representations about a material fact or engaging in deceitful conduct.

3. City officials should not engage in, permit, or condone waste, but should be proactive to identify waste and seek to correct the causes that lead to the waste. Waste in public service involves the extravagant, careless, or needless expenditure of City funds, or the consumption of City property, that results from deficient practices, systems, controls, or decisions.

4. City officials should not engage in, permit, or condone abuse, but should be proactive to identify abuse and seek to correct the causes that lead to the abuse. Abuse involves the improper use of City resources, including abuse of position, authority, or resources such as tolls, vehicles, or other City property.

5. City officials must be loyal to the public they serve and should put the public's interests above their personal interests.

6. City officials must protect and enhance the image and reputation of the City.

7. City officials must treat all citizens conducting business with the City with due courtesy,

efficiency, and impartiality, and no one citizen shall receive special advantage.

8. City officials must always be mindful of the public trust and confidence in the exercise of their assigned duties and shall refuse to condone breaches of public trust or improper attempts to influence the decision-making process.

9. City officials must always be mindful of conflict of interest laws and abide by them.

10. City officials must be aware of all their financial interests, thereby ensuring that such financial interests do not influence their conduct or actions.

11. City officials should avoid an appearance of a conflict of interest when possible. Recusal or abstention is appropriate when a good faith determination has been made by the City official that such action is required. However, elected officials subject to this chapter are reminded that they are elected to conduct the public's business and should not abstain or recuse themselves without cause.

12. City officials are expected to abide by all local, state, and federal laws.

13. The City values the ability of the boards and commissions to provide honest, forthright, learned, and independent advice to the City, thereby fostering greater public input into the conduct of City government. Accordingly, while City officials may attend City board and commission meeting, City officials should be mindful that their actions, whether intentional or not, may unduly impair or influence the boards' and commissions' ability to provide honest, forthright, learned, and independent advice to the City and, therefore, City officials should avoid such actions.

B. Additional Guiding Principles for Board of Ethics Members. In addition to the guiding principles set forth in subsection (A) of this section, Board of Ethics members should adhere to the following:

1. A Board of Ethics member that is a candidate for elected office should not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the Board of Ethics, including, but not limited to, commenting on complaints that have been before or may appear before the Board of Ethics or endorsing another candidate for any elected office using their title as current or former Board of Ethics member. A reference by a Board of Ethics member, in their own campaign materials, that they are or have been a member of the Board of Ethics alone does not violate this guiding principle.

2. A Board of Ethics member should conduct their outside activities so as to minimize the risk of conflicts with their duties as a Board of Ethics member.

3. A Board of Ethics member should perform their duties impartially. To accomplish the aforementioned guiding principle, a Board of Ethics member should refrain from participating in a matter before the Board of Ethics when they have a personal interest in the matter or, outside of a Board of Ethics meeting, have advocated, supported, or taken a position on that matter.

C. Specific Prohibitions. It is prohibited and shall be deemed unethical for a City official to engage in one or more of the following actions:

1. Accept gifts, favors, or promises of future benefits, which might compromise or tend to impair independence of judgment or action.

2. Use their official title or position for personal gain. Personal gain includes, but is not limited to, situations wherein a City official solicits or accepts items of value in consideration of their official title or position. This section does not include obtaining benefits that are otherwise authorized by law.

3. Divulge confidential information for personal gain or for the gain of associates in a manner contrary to the public interest or in violation of any law.

4. Use or permit the use of City resources including but not limited to funds, seals or logos, City time, personnel, supplies, equipment, identification cards/badges or facilities for unapproved non-City activities, except when available to the general public, provided for by administrative regulations or policies, or approved by City Council.

5. For current City officials, appear on behalf of the private interests of third parties before the Council or any board, commission or proceeding of the City; nor shall members of boards, commissions, and other advisory boards appear before their own bodies or before the Council on behalf of the private interests of third parties on matters related to the areas of service of their bodies, except for limited exceptions, as provided for in Fair Political Practices Commission Regulations, including Section 18702.4.

6. No ex-City official (not including former elected City officials) for a period of one year after leaving office or employment shall, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making oral or written communication before any City administrative office or agency or officer or employee thereof, if

the appearance of communication is made for the purpose of influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract for the sale or purchase of goods or property.

7. No former member of the City Council, including the Mayor, shall be eligible to appear as a compensated representative at any time before the Council, or any commission, board, or City staff in connection with any case or other matter with which he/she personally participated while an official or employee of the City for 12 months following the date of separation from elected or appointed office, except by permission of the City Council finding on four-fifths vote that special identified and articulated circumstances exist, cast at a regular public meeting taken after the involved member of the City Council has left office. Such special identified and articulated circumstances include, but are not limited to, determinations that it is in the best interest of the City to permit such representation, that the former Councilmember, including the Mayor, is uniquely qualified to appear on the matter, or it is impractical to require another representative to appear on the matter.

8. Endorse or recommend for compensation any commercial product or service in the name of the City or in the employee's official capacity within the City without prior approval by a City Council policy.

9. Violate Government Code Section 87100 related to financial interests and governmental decisions made by them. If a complaint is filed with the Board of Ethics alleging a violation of this subsection, the Board of Ethics recognizes that the Fair Political Practices Commission ("FPPC") is the primary enforcement authority of the Political Reform Act and that their decisions should be given great weight. As such, if a complaint is filed concurrently, then the Board of Ethics may defer action on such allegation, as set forth in this chapter. If a complaint is not filed concurrently, the Board of Ethics may submit a complaint to the FPPC and defer action until such complaint is addressed by the FPPC. A ruling on the merits by the FPPC may be accepted as a finding of the Board.

10. No City official shall coerce any of their subordinates or any other City employee to participate in an election campaign, contribute to a candidate or political committee, engage in any other political activity relating to a particular party, candidate, or issue, or to refrain from engaging in any lawful political activity. A general statement

encouraging another person to vote does not violate this prohibition.

11. No City official shall display campaign materials in any City-owned vehicle under their control and operated by that City official. Campaign materials include, but are not limited to, bumper stickers, signs, or other similar items.

12. No City official shall aid and abet another City official to violate the specific prohibitions enumerated in this subsection, nor shall they aid and abet any person to engage in conduct that would constitute a violation of the specific prohibitions enumerated in this subsection on their behalf.

13. No City official shall negotiate for employment with any person, firm, or organization at the same time that aforementioned person, firm, or organization has a matter pending before City Council, board or commission, or a City department and upon which the City official must act or make a recommendation. (Ord. 3264 § 1, 2013).

2.01.040 Severability.

If any provision of this chapter, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this chapter to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this chapter are severable. (Ord. 3264 § 1, 2013).

Chapter 2.28**BOARD OF ETHICS*****Sections:**

- 2.28.010 Establishment of the Board of Ethics.
- 2.28.020 Purpose.
- 2.28.030 Function and duties of the Board of Ethics.
- 2.28.040 Powers of the Board of Ethics.
- 2.28.050 Membership.
- 2.28.060 Meetings and staffing.
- 2.28.070 Order of business.
- 2.28.080 Advisory opinions.
- 2.28.085 Board referral for investigation.
- 2.28.090 Complaints – Form, referral to other enforcement agency and requests for confidentiality.
- 2.28.100 Complaint procedures – Receipt of complaint.
- 2.28.110 Complaint procedures – Prima facie review.
- 2.28.120 Complaint procedures – Probable cause hearing.
- 2.28.130 Complaint procedures – Hearing on the merits.
- 2.28.140 Complaint procedures – Decision after hearing on the merits.
- 2.28.150 Conflicts.
- 2.28.160 Disclosure of Board records.
- 2.28.170 Severability.

* Prior legislation: Prior code §§ 1.48 – 1.51; Ords. 1040, 2297, 2453, 2629, 2630 and 2778.

For provisions of Charter law concerning appointive boards and commissions, see City Charter §§ 600 – 606.

Code reviser's note: Section 4 of Ordinance 3264 provides: "Violations of Chapter 2.28 that occurred prior to the effective date of this Ordinance, shall be subject to the provisions of Chapter 2.28 and/or Board of Ethics policies or procedures in effect before the effective date of this Ordinance."

2.28.010 Establishment of the Board of Ethics.

The Board of Ethics is hereby created. The provisions of Article VI of the Chula Vista City Charter, Chapters 2.01 and 2.25 CVMC, and this chapter shall govern the Board of Ethics. (Ord. 3264 § 1, 2013).

2.28.020 Purpose.

It is the purpose of the Board of Ethics to advise and make recommendations to the City Council of the City of Chula Vista on all matters relating to potential unethical conduct and to make such necessary and appropriate recommendations to the City Council for the implementation of the code of ethics, as set forth in Chapter 2.01 CVMC, and amendments thereto, which may become necessary from time to time. The Board of Ethics will serve as a hearing body for violations of the code of ethics, as set forth in Chapter 2.01 CVMC, and shall render impartial and objective opinions and ensure that those covered by the code of ethics are appropriately informed.

Members of the Board of Ethics should be aware that they are in a unique position of trust given their role under this chapter and as such must strive to avoid any appearance of bias or partiality. Accordingly, they should be aware that their conduct and actions will be scrutinized by the public at all times, but particularly during the election cycle. (Ord. 3264 § 1, 2013).

2.28.030 Function and duties of the Board of Ethics.

It shall be the function of the Board of Ethics to implement the code of ethics as set forth in this chapter. The duties of the Board of Ethics shall be:

A. To receive or initiate complaints of violations of the code of ethics.

B. To hear and investigate complaints and transmit the findings and recommendations to the City Council.

C. To render advisory opinions or interpretations with respect to the application of the code of ethics and this chapter, either on request or on its own initiative.

D. To propose revisions of this chapter or other City policies to assure its continuing pertinence and effectiveness. (Ord. 3264 § 1, 2013).

2.28.040 Powers of the Board of Ethics.

In order to carry out its duties, the Board of Ethics is authorized to receive complaints, conduct investigations upon complaints or information received, make referrals to other governmental agencies regarding unethical conduct, hold hearings, swear witnesses, render advisory opinions and adopt rules of procedure for the conduct of its business. (Ord. 3264 § 1, 2013).

2.28.050 Membership.

A. The Board of Ethics shall be composed of seven members, to be appointed in accordance with Article VI of the City Charter, Chapter 2.25 CVMC, and this chapter. Irregularities in the interview process set forth in CVMC 2.25.050(D) may be brought to the attention of the City Council.

B. No person shall be appointed as a member of the Board of Ethics, or shall be entitled to retain their membership, if he or she, within the past 10 years prior to the date of appointment, has been convicted of any felony or a crime involving moral turpitude, has been found to have committed a criminal violation of the Fair Political Practices Act, or has a conflict of interest as defined in this chapter.

C. A "conflict of interest" for purposes of this section shall mean the following:

1. The applicant or any of applicant's relatives is or has been an employee of or sought employment from any City official subject to this chapter;

2. The applicant or any of applicant's relatives is or has been supervised in an employment setting by any City official subject to this chapter;

3. The applicant has served in any capacity (including staff member, advisor, or volunteer) involving the election, selection, or appointment of any City official subject to this chapter to any public office (elected or appointed);

4. The applicant has served in any capacity (including staff member, advisor, or volunteer) opposing the election, selection, or appointment of any City official subject to this chapter to any public office (elected or appointed); or

5. The applicant is related to any City official subject to this chapter.

D. This section is not retroactive. (Ord. 3264 § 1, 2013).

2.28.060 Meetings and staffing.

The Board of Ethics will hold meetings as set forth in CVMC 2.25.200(A)(2). The City Attorney or his or her appointed representative shall act as secretary to the board. The secretary shall cause notice of the meetings of the board to be kept and distributed. The secretary shall also give appropriate and required written notice of all meetings to all members and persons having business before the board. (Ord. 3264 § 1, 2013).

2.28.070 Order of business.

A. The following shall be the order of business for all meetings:

1. Roll call of members.
2. Reading of minutes of previous meeting.
3. Amendment or approval of minutes of previous meeting.
4. Consideration of matters continued from previous meeting.
5. Consideration of new complaints or requests.
6. Consideration of proposed or existing state legislation in the field of ethics and amendments to the code of ethics of the City of Chula Vista.
7. Other business.
8. Oral communication.

The aforementioned order of business may be modified by an affirmative vote of the Board of Ethics.

B. Items of business shall be placed on the agenda as set forth in CVMC 2.25.210(A). (Ord. 3264 § 1, 2013).

2.28.080 Advisory opinions.

When a City official has doubt as to the applicability of a provision of this chapter to a particular situation, he or she may make a written inquiry to the Board of Ethics for an advisory opinion. The purpose of the advisory opinion is to assist the City official in the task of judging themselves, so as to enable them to properly carry out their responsibilities as trustees in the public interest, and to conform their conduct to the code of ethics. The City official shall have the opportunity to present their interpretation of the facts at issue and of the applicable provisions of this chapter before such advisory opinion is rendered. The Board of Ethics may also, on its own initiative, issue advisory opinions regarding the interpretation or implementation of any provision of this chapter. (Ord. 3264 § 1, 2013).

2.28.085 Board referral for investigation.

A. If an individual BOE member personally observes a violation of the code of ethics, he or she may inform the BOE and request that the matter be referred to a panel attorney ("Panel Attorney") that is serving as the enforcement authority under Chapter 2.52 CVMC for investigation.

B. If a panel to serve as the enforcement authority has not been established, the Board of Ethics shall establish, in a manner similar to the process used to create the panel for the enforcement authority, a panel of attorneys to serve pursuant to this section.

C. The Board of Ethics may refer the matter to a Panel Attorney if the BOE member presenting the request makes a prima facie showing as set forth in CVMC 2.28.110. This provision may not be used in the place of or to circumvent the other provisions in this chapter for the submission of complaints. Once a BOE member submits a request under this section and the matter is submitted to a Panel Attorney, they shall recuse themselves from voting on the complaint.

D. The BOE referral shall go to a Panel Attorney for investigation and determination if probable cause exists on the complaint. The Panel Attorney may dismiss the complaint if he determines that probable cause does not exist or if he concludes he cannot prove that probable cause exists. If he dismisses the case for lack of probable cause, he shall inform the Board of Ethics and provide a basis for the dismissal. If the panel attorney determines that probable cause exists, he shall present his case as set forth in CVMC 2.28.120 for determination by the Board of Ethics if probable cause exists. If the Board of Ethics determines that probable cause exists, another Panel Attorney will continue the investigation for submission to the BOE for a full hearing. Panel Attorneys assigned under this subsection will be assigned in the same manner they are assigned to investigate complaints for violations of Chapter 2.52 CVMC. The Panel Attorney shall present the matter for full hearing as set forth in CVMC 2.28.130. (Ord. 3264 § 1, 2013).

2.28.090 Complaints -- Form, referral to other enforcement agency and requests for confidentiality.

A. All complaints regarding violations of this chapter shall be in writing, identify a person subject to the code of ethics, contain a full allegation of facts that would constitute a violation of the specific prohibitions enumerated in this chapter, and be sworn under penalty of perjury. All alleged violations must be submitted within 90 days of occurrence or when it should have been discovered with the exercise of reasonable diligence. Justification for any delay in filing complaints is the responsibility of the complainant. For complaints concerning unethical patterns of behavior, such complaints must be received by the Board of Ethics within 90 days of the most recent event comprising the pattern of behavior complained of, or within 90 days of when the last event should have been discovered with the exercise of reasonable diligence. The Board of Ethics will, in its discretion, limit the pattern of behavior to those events the Board of Ethics

feels are proximately related in time to be a part of the same pattern of behavior.

B. The Board may refer the matter to a local, state, or federal enforcement agency that may have jurisdiction over the matter at any stage of the proceedings and may hold in abeyance Board action pending results of the referral. The Board of Ethics may, but is not required to, resume Board action on the matter if it has been provided notice of inaction by the agency to whom the complaint was referred, the expiration of any applicable statute of limitations, or inaction for more than one year by the agency to whom the complaint was referred. Local, state and federal enforcement agencies include, but are not limited to, the United States Attorney's Office, the California Attorney General's Office, the San Diego County District Attorney's Office, the San Diego County Grand Jury, and the Fair Political Practices Commission (FPPC). If the Board learns of misconduct during any stage of the proceedings, but the misconduct is not within the specific prohibitions set forth in this chapter, the Board of Ethics may make a referral to the appropriate local, state, or federal enforcement agency that may have jurisdiction over the alleged misconduct.

C. The name of the complainant shall be disclosed unless the complainant has requested that their name be kept confidential and there is good cause to withhold such name. Requests for confidentiality shall be addressed as follows:

1. To request that their name be kept confidential, the complainant must provide, with their complaint, a detailed factual statement, sworn under penalty of perjury, that they would suffer harm or retaliation if their name were to be disclosed. Facts that may be considered to determine if good cause exists may include, but are not limited to:

a. The existence of an employer/employee or supervisor/subordinate relationship between respondent and complainant or the existence of such a relationship between complainant's spouse or immediate relative(s) and respondent or respondent's spouse or immediate relative;

b. Facts that show that complainant would be shunned, ostracized, or rebuked by any organization or group to which they belong if their name were to be made public;

c. Evidence of prior acts of retaliation or harm by respondent against complainant or any other person;

d. The existence of criminal convictions for crimes of violence by or the existence of any restraining orders against respondent.

Conclusionary or speculative statements of harm or retaliation are insufficient to establish good cause.

2. Upon a request for confidentiality, the Chair and two Board members, chosen by the Chair on a rotating basis, shall form an ad hoc subcommittee within two business days of being informed by the City Attorney's Office of a request for confidentiality and, after consideration of the request, determine if good cause exists to withhold disclosure of the name. The Chair shall inform the complainant of its decision within five business days.

3. If the decision is to deny the request for confidentiality, complainant shall have five business days to withdraw their complaint. If complainant requests that the complaint be withdrawn, the entire complaint shall be returned to complainant and their complaint shall not be disclosed. The complaint and complainant's name shall be not disclosed during this evaluation process.

4. Upon a finding of good cause by the ad hoc subcommittee formed under this section, the name of the complainant shall be kept confidential unless and until a finding of probable cause is made. The complaint shall also be redacted accordingly. (Ord. 3264 § 1, 2013).

2.28.100 Complaint procedures – Receipt of complaint.

A. The following procedures will be followed upon receipt of a complaint:

1. The complaint will be assigned a case number.

2. The complainant ("complainant") will be sent a letter that provides notice that the complaint was received, the date of the next hearing in which the complaint will be addressed, and which generally explains the procedures that will be followed.

3. The subject of the complaint (hereinafter "respondent") will be sent a letter that provides notice that a complaint has been received naming them as the subject, the date of the next hearing in which the complaint will be addressed, and which generally explains the procedures that will be followed. The respondent will also be sent a copy of the complaint with the letter. The complaint may be redacted as provided for in CVMC 2.28.090(C) (related to confidentiality requests).

4. The Chair of the Board of Ethics shall be notified that a complaint has been received. Not-

withstanding any other time frames, the Chair may set a special meeting on the complaint.

5. A preliminary review (hereinafter "prima facie review") of the complaint will be set within 30 days of receipt of the complaint. If the complaint is received within 90 days of a municipal election in which a City official is a candidate, the prima facie review of the complaint will be set within 15 days of the receipt of the complaint. The Chair and members shall be sent copies of the complaint for their review prior to the hearing. The Chair and members receiving copies of the complaint shall not discuss the complaint nor disclose the complaint to any person outside of the hearing. (Ord. 3264 § 1, 2013).

2.28.110 Complaint procedures – Prima facie review.

The Board of Ethics will conduct a prima facie review ("prima facie review") of the complaint. The purpose of prima facie review is to determine if the complainant has made a prima facie showing that the complaint complies with the requirements in CVMC 2.28.090(A) (Complaints – Form, referral to other enforcement agency, and request for confidentiality), thereby establishing jurisdiction. A prima facie review may result in the following:

A. No Prima Facie Showing Made – Dismissal. After completing the prima facie review, the Board may dismiss the complaint for any of the following reasons:

1. The complaint is not in writing or is not made under penalty of perjury;

2. The respondent is not a City official within the meaning of this chapter;

3. The complaint does not contain a full allegation of facts that would constitute a violation of the specific prohibitions enumerated in this chapter;

4. The complaint restates other complaints containing essentially similar or identical allegations that have already been disposed of, and the evidence presented does not warrant reopening of the previous case;

5. The allegations contained in the complaint are already under investigation by the Board of Ethics;

6. The complaint consists of speculation, opinion, frivolous contentions, or absurd accusations; or

7. The Board of Ethics determines other good cause requires dismissal. If the dismissal is for this reason, the good cause must be set forth in the minutes of the preliminary review.

If the complaint is dismissed, the Board shall issue a letter to the complainant and respondent as soon as possible, indicating the reason for the dismissal of the complaint. Such letter is not a conclusive finding and is not intended to be evidence in any enforcement action initiated by another agency.

B. Prima Facie Showing Made – Further Action. If the Board determines that a prima facie showing has been made, then the Board shall determine the appropriate course of action, including the following:

1. The Board may request additional information from complainant or the respondent. The Board shall endeavor to complete this action within 45 days from the prima facie finding. If the information is not received within the 45 days, such fact shall be reported to the Board. After this stage is complete, the matter should be set for a probable cause hearing within 30 days.

2. The Board may create an ad hoc subcommittee comprised of one to three board members to conduct further investigation. The ad hoc subcommittee shall endeavor to complete its investigation within 90 days of the prima facie finding. If the investigation is not completed within the 90 days, such fact shall be reported to the Board. After this stage is complete the matter should be set for a probable cause hearing within 30 days.

3. The Board may hire an individual from a list of prequalified investigators to conduct an investigation. This provision is subject to available funding. The investigator shall endeavor to complete the investigation within 90 days of the prima facie finding. If the investigation is not completed within the 90 days, such fact shall be reported to the Board. After this stage is complete the matter should be set for a probable cause hearing within 30 days.

The Board of Ethics shall establish a written policy for the selection of prequalified investigators. In determining qualifications, the Board of Ethics shall consider, but is not limited to, the following:

- a. Professional licensing;
- b. Experience in conducting investigations;
- c. Area or areas of expertise required for the investigation;
- d. Available support staff;
- e. Reasonable costs;
- f. The existence of conflicts of interest;
- g. Proven ability to timely complete tasks.

4. The Board may set the matter for a probable cause hearing. The Board shall endeavor to set the probable cause hearing within 45 days of the prima facie finding. (Ord. 3264 § 1, 2013).

2.28.120 Complaint procedures – Probable cause hearing.

The purpose of the probable cause hearing is to determine if there are facts and circumstances, of a reasonably trustworthy nature, sufficient to justify a person of reasonable caution or prudence in the belief that a violation of the specific prohibitions has occurred (“probable cause”). To find probable cause, there must be an affirmative vote of the majority of the entire voting membership. The following procedures shall be followed in the conduct of a probable cause hearing:

A. Both parties shall be provided notice that the probable cause hearing has been set.

B. The complainant and respondent shall be informed that they may lodge with the Board 10 days before the hearing additional evidence and a statement on their behalf for the Board’s consideration. If such evidence is not provided to the Board within the time frame indicated, the Board may, but is not required to, exclude such evidence. As soon after receipt of such evidence by the Board, the Board should endeavor to provide the opposing party a copy thereof.

C. At the hearing, the Board shall review, but is not limited to, the following: the complaint, including any supporting documents, that was filed; information acquired during any Board-ordered investigation or request for information; and any other documents or evidence provided to the Board before the probable cause hearing.

D. The Board, in its discretion, may permit additional documents or evidence to be admitted into the probable cause hearing. The Board, in its discretion, may also permit witnesses to testify. Witnesses may be subject to cross-examination, as permitted by the Board.

E. Both parties may comment on the issue of probable cause, as permitted by the Brown Act.

F. If the Board determines that probable cause does not exist, the Board shall dismiss the complaint.

G. If the Board determines that probable cause exists, the Board should set a hearing on the merits within 45 days thereafter. (Ord. 3264 § 1, 2013).

2.28.130 Complaint procedures – Hearing on the merits.

If probable cause is determined to exist by the Board, then the Board shall conduct a hearing on the merits (“hearing on the merits”) as set forth herein:

A. Prior to the hearing on the merits, the Board may request additional information as set forth in CVMC 2.28.110(B). The Board should set a date by which a request for additional information should be completed.

B. Both parties shall be provided notice of the hearing on the merits. The Board may provide copies of materials upon which the complaint is based to either party.

C. In the discretion of the Board, complainant may present an opening and closing statement, present additional evidence and witnesses, including rebuttal evidence and witnesses, and cross-examine witnesses.

D. In the discretion of the Board, the respondent may present an opening and closing statement, present additional evidence and witnesses, including rebuttal evidence and witnesses, and cross-examine witnesses.

E. The Board may admit, but is not limited to, evidence provided at the hearing on the merits, information provided with the complaint, information provided pursuant to CVMC 2.28.110(B), or subsection (A) of this section, information provided at the probable cause hearing, and any other evidence it determines should be considered.

F. The hearing on the merits is not a formal judicial proceeding, but the Board will exercise control over the hearing to ensure that it is conducted in an orderly and expeditious manner. While the technical rules of evidence are not applicable and hearsay is admissible, evidence that is admitted should bear indicia of reliability. (Ord. 3264 § 1, 2013).

2.28.140 Complaint procedures – Decision after hearing on the merits.

The Board shall document its decision in a written statement of decision. A vote of five board members is required to make a finding of misconduct. Each finding of misconduct must be supported by a preponderance of the evidence. The statement of decision should be prepared expeditiously and shall be served upon both parties via certified mail with a certificate of mailing.

A. Misconduct Found – Declaration of Misconduct. If the Board makes a finding of misconduct, the statement of decision shall contain, and be

labeled as such, a declaration of misconduct. The declaration of misconduct shall detail the misconduct that has been found to be true and the supporting evidence. The declaration of misconduct shall be a final decision on the merits and shall not be changed by the City Council. The declaration of misconduct may contain a recommendation of sanctions against the City official found to have engaged in misconduct, including, but not limited to, the following: a reprimand, censure, or removal from office. The declaration of misconduct may also recommend remedial actions to prevent misconduct in the future.

Government Code Sections 3250 et seq. (Firefighter Procedural Bill of Rights Act) and 3300 et seq. (Public Safety Officers Procedural Bill of Rights Act) provide appeal rights for the Police and Fire Chief. The Police and Fire Chief shall be provided the appeal rights required under the aforementioned Government Code sections and City Council shall act as the body hearing any such appeal.

B. No Misconduct Found – Declaration of No Misconduct. If the Board makes a finding of no misconduct, the statement of decision shall contain, and be labeled as such, a declaration of no misconduct. The declaration of no misconduct shall detail the basis for its finding. (Ord. 3264 § 1, 2013).

2.28.150 Conflicts.

City officials subject to the specific prohibitions set forth in this chapter should not participate in or influence the complaint process as set forth in CVMC 2.28.090 to 2.28.140 in their official capacities. To this end, when a complaint involves a Board of Ethics member, a Councilmember (including the Mayor) or the City Attorney, the following procedures shall be followed:

A. If a complaint involves a Board of Ethics member, then the named Board of Ethics member shall recuse himself or herself.

B. If a complaint involves a Councilmember, including the Mayor, then the named Councilmember shall recuse himself or herself.

C. If the complaint involves the City Attorney, the City Attorney and his or her office shall recuse themselves. Outside counsel shall be appointed by the Board of Ethics to advise the Board of Ethics regarding a complaint alleging misconduct by the City Attorney. The Board of Ethics may establish procedures for the selection of such counsel. (Ord. 3264 § 1, 2013).

2.28.160 Disclosure of Board records.

The purpose of this section is to advance the public's interest under the Public Records Act to access information concerning the conduct of the Board in a manner that will not compromise the Board's ability to conduct effective and confidential investigations into alleged violations of the City of Chula Vista's code of ethics. The Board and its staff shall not make public comments regarding a pending matter until the Board has made a final decision on the merits or until the matter is otherwise closed. The complaint may be released to the public. The complaint may be redacted consistent with CVMC 2.28.090 (regarding requests for confidentiality). The Board may release its records unless they fall within, but not limited to, the categories that follow:

A. Preliminary or draft memoranda, documents, or records not kept in the ordinary course of business.

B. Personnel, medical, or other similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

C. Documents or records protected under any law (state or federal) related to privilege.

D. Records exempt from disclosure under the California Public Records Act (Government Code Section 6250 et seq.).

E. Documents or records where the public interest against disclosure outweighs the public interest served by disclosure. Such documents may include, but are not limited to, the following:

1. The names of juvenile witnesses; or
2. Personal or otherwise private information related or unrelated to the investigation if the disclosure would constitute an unwarranted invasion of privacy; or
3. The identity of a confidential source; or
4. Information, which, if disclosed, would create a credible risk of endangering any individual; or
5. Information, which, if disclosed, would endanger the successful completion of an investigation where the prospect of enforcement proceedings is concrete and definite. (Ord. 3264 § 1, 2013).

2.28.170 Severability.

If any provision of this chapter, or the application of any such provision to any person or circumstance, shall be held invalid, the remainder of this chapter to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those as to which it is held

invalid, shall not be affected thereby, and to this end the provisions of this chapter are severable. (Ord. 3264 § 1, 2013).

LOUNSBERY FERGUSON ALTONA & PEAK LLP

ESCONDIDO AND SAN DIEGO

960 Canterbury Place, Suite 300
Escondido, California 92025-3870
Telephone (760) 743-1201
Facsimile (760) 743-9926
www.LFAP.com

SPECIAL COUNSEL
JOHN W. WITT

James P. Lough
Of Counsel

Direct: (760) 743-1201
Email: JPL@LFAP.com

TO: Chula Vista Board of Ethics

FROM: James P. Lough, Special Counsel

DATE: March 18, 2015

SUBJECT: *Prima Facie* Review: Chula Vista Municipal Code Section 2.28.110 (Ethics Complaints: Appointment of Councilmember Steve Miesen, January 13, 2015)

You have asked our office to review two complaints objecting to the Appointment of Councilmember Steve Miesen. (Attachments “A” & “B”.) Under Chula Vista Municipal Code (“CVMC”) Section 2.28.110, the Board of Ethics is required to review the two complaints to determine if they establish a *prima facie* case of violations covered by CVMC Chapter 2.28 warranting further investigation. As discussed below, it is the recommendation of Special Counsel that the two complaints be dismissed for not meeting the standards set out in CVMC Section 2.28.110(A)(3). The allegations contained in the two complaints do not contain allegations of facts that would constitute a violation of the specific provisions enumerated in CVMC Chapter 2.28. The issues raised relate to matters outside of the jurisdiction of the Board of Ethics.

GOVERNMENT CODE SECTION 1090 (ANTI-CONTRACTING PROHIBITION)

The primary allegation under both complaints deals with Government Code Section 1090 (“1090”).¹ Because a public official cannot “serve two masters”, the Legislature adopted the anti-contracting provisions to regulate private contracts with public entities to regulate and, in many cases, prohibit participation by public officials. (Attachment “C”.) These regulations fall into three categories: prohibited interests (1090); remote interests (1091); and non-interests (1091.5).

It is our understanding that the City Attorney rendered an opinion on the applicability of the anti-contracting laws to the appointment of Councilmember Miesen. As discussed below, it is not

¹ All statutory references are to the California Government Code unless otherwise noted.

Chula Vista Board of Ethics

March 18, 2015

Page 2 of 5

within the scope of the appointment of Special Counsel to render a second opinion on this issue. It is the charge to this office to assist the Board in determining whether there is a prima facie case under CVMC 2.28. Any opinion about the appointment process by this office would not have any legal effect on the appointment or the assumption of office of Councilmember Miesen. (*See, People v. Chacon* (2007) 40 Cal.th 558.) However, with regard to the scope of this opinion, the law is clear that contracts entered into before the appointment of a public official do not violate 1090. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops. Cal. Atty. Gen. 176 (2002); 84 Ops. Cal. Atty. Gen. 34 (2001).) The official may continue to serve during the term of the contract. The appointment does not void the contract. If the contract is extended, amended or renegotiated, the issue will arise again. This opinion does not cover past transactions prior to the January 13, 2015 appointment. It also does not speculate on the possible future contract issues involving the appointed Councilmember.

While this opinion is limited to the jurisdiction of the Board of Ethics, some explanation is needed to explain the three interests under the anti-contracting legislation. The most important interest is the “prohibited interest”. A prohibited interest bars the person from serving as a public official because of the contract interest. These interests are of such a degree that mere service in a public position is not tolerated. (*See, Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, 1073; *Thomson v. Call* (1985) 38 Cal. 3d 638, 650.)

The second interest is a “remote interest”. (§1091.) A remote interest is an interest of the public official in a contract that allows the official to hold public office as long as they disqualify themselves from any participation in any involvement in their contract issues with the City. The Legislature, under 1091, has set out specific rules that define what type of interest is “remote”.

The third type of interest is a “non-interest”. (§1091.5.) This category allows an official to serve as a public official and vote on the matter as long as they disclose their interest in the contract. These “interests” typically involve non-profit private positions.

JURISDICTION OF THE BOARD OF ETHICS OVER 1090 ISSUES

Under CVMC Chapter 2.28, the jurisdiction of the Board of Ethics is established. (CVMC Sec. 2.28.020 (PURPOSE).) The Board is to hear issues of violations of the prohibitions established under the City’s Code of Ethics. (CVMC Chapter 2.01.) The Code of Ethics “Specific Prohibitions” are found under CVMC Section 2.01.030(C). There are thirteen separate subsections that list the prohibited conduct subject to the Board’s enforcement authority. Prohibited contracting is not listed in any of these categories.

The absence is not surprising considering the State Legislature’s intent when it adopted 1090. The California Legislature meant to establish statewide standards and the means that they were not be enforced. Intentional violations are subject to criminal prosecution by the County District

Chula Vista Board of Ethics
March 18, 2015
Page 3 of 5

Attorney or the State Attorney General. Lesser violations are also subject to the jurisdiction of District Attorneys and the Attorney General. In recent years, the Legislature has given concurrent authority over 1090 issues to the Fair Political Practices Commission. (§1097.1.) This jurisdiction is not granted pursuant to the Political Reform Act (87100 *et. seq.*), but through specific sections of §1090 *et seq.* Therefore, CVMC 2.01.030(C)(9) regarding violations of the Political Reform Act do not come into play. Even if it did, the FPPC rules regarding conflicts of interest do not arise until there is an action taken in a conflicted matter. The appointment of a public official who is interested in a contract, by itself is not a violation. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops. Cal. Atty. Gen. 176 (2002); 84 Ops. Cal. Atty. Gen. 34 (2001).) Since none of the thirteen prohibitions listed under CVMC 2.01.030(C) prohibit interests in contracts, the two complaints do not state a *prima facie* case for a 1090 *et seq.* contracting violation under Chula Vista Ethics rules. Potential enforcement of the anti-contracting rules lies with other enforcement agencies determined by the California Legislature.

GOVERNMENT CODE 8920 ET SEQ. ETHIC RULES

The second claim under the first complaint (Attachment “A”) relates to the State Code of Ethics. This California Government Code is not applicable to local Chula Vista officers. The rules only apply to state officers. Attached is a copy of the applicable portions of the Attorney General’s Conflict of Interest Guide on the subject. (Attachment “D”) They clearly lay out the inapplicability of these rules.

MATTER PENDING BEFORE THE OFFICIAL (CVMC 2.01.030(C)(13))

The second complaint (Attachment “B”) raises the claim that the official is negotiating for employment at the same time that the official “must act or make a recommendation”. The appointment of Councilmember Miesen was not an action that he took on a matter that he was a “city official” and “must act or make a recommendation”. At some future time, the Councilmember may be faced with an issue involving the contract between his employer and the City. However, his appointment does not raise that issue. As discussed above, the mere taking of office does not constitute a violation. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops. Cal. Atty. Gen. 176 (2002); 84 Ops. Cal. Atty. Gen. 34 (2001).) No matter was pending where Councilmember Miesen acted as an official under CVMC 2.01.030(C)(13).

CALIFORNIA CONFLICT OF INTEREST VIOLATION

The second complaint raises a Political Reform Act Conflict of Interest allegation. However, as discussed above, the complaint deals with the appointment of the Councilmember. This action does not constitute participation by the appointed Councilmember in a matter that he has a personal financial interest requiring recusal. At the time of the appointment, the Councilmember was not a public official. (*See*, 82048; Fair Political Practices Commission Regulation (“Regulation”)

Chula Vista Board of Ethics

March 18, 2015

Page 4 of 5

§18701, subd. (b)(1).) Once appointed, there was no action taken or matter considered where he had a financial interest. (Regulation § 18702.1, subds. (a)(1)-(4).) One may occur in the future, but there is no issue under the FPPC conflict of interest regulations at this time.

COMMON LAW CONFLICT ALLEGATION

Common law conflicts deal with bias and other conflicts that predate the Political Reform Act and are judicially enforced. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152.) In *Clark*, the court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his or her personal or pecuniary interests. In addition, the doctrine applies to situations involving a nonfinancial personal interest. (*Id.* at p. 1171, fn. 18; 92 Ops. Cal. Atty. Gen. 19 (2009).)

Here, there has not been a decision that Councilmember Miesen has been involved in that would trigger the common law doctrine under the allegations of either complaint. Therefore, the common law allegation does not present a *prima facie* case.

INCOMPATIBLE OFFICES

The second complaint raises the holding of two “incompatible” offices claim. (§1135 *et. seq.*). The state rules on incompatible offices are not self-executing. (§1126, subd. (a).) The Board of Ethics does not have a specific ordinance that specifies standards for incompatible offices that meet the state requirements to implement the incompatible office statutes. Without specific standards, no enforcement could take place and no *prima facie* case can be established

Since the issue is a contractual relationship, the issue is not the office but the timing and impact of the contract with the City. This issue is covered by the anti-contracting laws that the State Legislature has designated other enforcement agencies that do not include the Board of Ethics. . None of the thirteen categories in 2.01.030(C) would apply.

COUNCIL RECUSAL ON THE APPOINTMENT

The final allegation in the second complaint asks that the entire City Council be recused from the appointment process involving Mr. Miesen. However, the complaint lists no grounds for such a recusal. None of the Councilmembers who voted on the matter are alleged to have a financial interest in the vote to approve Councilmember Miesen. Furthermore, the Board of Ethics has no jurisdiction to override City Council actions.

CONCLUSION

Chula Vista Board of Ethics

March 18, 2015

Page 5 of 5

Special Counsel recommends that the Board of Ethics find that there are no grounds in either complaint to make a *prima facie* case regarding the appointment of Councilmember Miesen. The main question raised in both complaints is about the appointment of a Councilmember who works for a company that had a contract to perform services for the City prior to his appointment. The appointment itself did not raise any issues about the terms and conditions of the contract. No vote was taken or contemplated on the contract. Since no vote was taken or contemplated on the contract itself, the City's conflict of interest rules do not come into play at this time.

The authority over anti-contracting issues has been placed elsewhere by the California Legislature. It lies with the District Attorney, State Attorney General and the Fair Political Practices Commission. Any citizen, including the complainants, may file complaints with the agencies that have jurisdiction over such matters. The Board of Ethics was established without jurisdiction over 1090-type contracting claims. If it had jurisdiction over these matters, that jurisdiction would likely conflict with state law and impair the City Council's ability to determine whether to affirm or reject a contract that violates these rules. (§1092.) It could also interfere with the enforcement actions of those agencies that are charged with enforcement.

I will be present at the meeting to answer questions.

JPL;kld

Attachments

EXHIBIT A



TIME STAMP

CITY OF CHULA VISTA
CITY CLERK'S OFFICE

COMPLAINT FORM

[illegible]

request
I formally request that the appointment of Mr. Miesen to the City Council be reviewed by the State Attorney General (or outside counsel if appropriate). The State AG traditionally rules and opines on issues that appear to suggest conflicts of interest as described in California Code 1090. It strongly appears that Miesen has 1090 issues that would be better resolved by the State AG. As noted in La Prensa in a recent editorial:

"The City Attorney, Glen Googins, took a very narrow view, looking at only the financial disclosure form, and stated that because the city contract with Republic Services, where Miesen serves as Division Manager, would not come up in the next two years, that he was good to go."

The City Attorney was remiss in not looking deeper into the entire relationship that Miesen has been in with the City including but not limited to Miesen's ownership status in Republic Waste. He is a Division Manager of Republic Services, the sole provider of trash pick-up, recycling, and management of a landfill on public lands. Republic Services is considered a PUBLIC/PRIVATE partnership. That means they are a private contractor that has been outsourced to provide a city service. This would be similar to Sweetwater Authority, a public agency that serves the needs of the city. A water district and an elected office was cited in an example of incompatible offices which "presented a significant potential for a clash of duties and loyalties..."

As pointed out significantly by La Prensa: "Because Miesen is simultaneously serving as the head of a public private partnership and as an appointed city council person whose job it is to oversee the outsourcing contract, the Miesen appointment would fall under the Common Law doctrine prohibiting "self-dealing", the statutes relating to incompatible offices (offices referring to public offices as well as positions of authority in other organizations), and California Law, section 1090. According to the Attorney General, "Section 1090 essentially prohibits a public official from being financially interested in a contract in both the official's public and private capacities." Miesen not only owns shares of Republic Waste, but he also collects a substantial salary as Division Manager.

Further Googins may have neglected to refer to the following: Chapter XIV. CODE OF ETHICS Government Code Section 8920 et seq., which in part states: E. Potential Conflict in Duties or Functions -- The incompatible offices prohibition does not require proof of an actual clash between the two offices in the context of a particular decision. It is enough that there is potential for a significant clash between the two offices at some point in the future.

And then there is the problem of significant political contributions that Mr. Miesen and Republic/Allied Waste have made to elected officials most notably the City Attorney, Mayor and Councilmembers. If form 460's show that political contributions have been made from Miesen and his company to current sitting city officials, it would seem that these 460 filings should have been revealed prior to the nomination consideration of Miesen. It would seem that ethics considerations should have immediately come into play with recusals from each official that received political contributions from Miesen and all officials from Republic/Allied. Therefore, Mr. Miesen may have never been nominated if such responsible actions had taken place prior to his consideration. The appearance of Miesen gaining appointment because he politically contributed to the "right people" certainly sends the wrong message about Chula Vista and destroys the credibility of the entire appointment process and suggests the office of City Councilmember is "for sale".

EXHIBIT B

DOE complaint # 2-20-15A

Page 1



RECEIVED

TIME STAMP

15 FEB 20 09:55

CITY OF CHULA VISTA
BOARD OF ETHICS

CITY OF CHULA VISTA
CITY CLERK'S OFFICE

COMPLAINT FORM

Please print or type. This form may be completed and filed with the City Clerk at 276 Fourth Avenue, Chula Vista, CA 91910. See reverse side of form for additional information.

COMPLAINANT'S NAME	Helen PROSSER	DAYTIME PHONE	[REDACTED]
COMPLAINANT'S ADDRESS	[REDACTED] CITY [REDACTED] ZIP 91911	ALTERNATE PHONE	[REDACTED]
LOCATION OF INCIDENT	Chula Vista City Hall	DATE AND TIME OF INCIDENT	01/13/15
NAME OF CITY OFFICIAL(S)	Steve Miesen, Mary Salas, Pamela Benson, John McCann,		
NARRATIVE OF COMPLAINT	PAT AGUILAR, GLEN GOOGINS, SIMON SILVA		
I object to the Steve Miesen City Council appointment and think that it violates California Conflict of Interest and Common Law and incompatible office statutes.			
The following specific code violation is the basis for my complaint: section 2.01.030 (C):			

18. No City official shall negotiate for employment with any person, firm, or organization at the same time that aforementioned person, firm, or organization has a matter pending before City Council, board or commission, or a City department and upon which the City official must act or make a recommendation. (Ord. 3264 § 1, 2013).

Since Steve Miesen is the Division Manager of Republic Waste and his company has ongoing business with the city's finance department, I believe Steve Miesen will definitely have a "conflict"

CONTINUED ON ADDITIONAL SHEETS ☒

CERTIFICATION:

I declare that the statements made on this form, as well as any attached statements of my own, are true and correct to the best of my knowledge and belief. This declaration is made under penalty of perjury, under the laws of the State of California.

Signed:

Helen Prosser

Date:

February 20, 2015

Page 2



**CITY OF CHULA VISTA
BOARD OF ETHICS**

Please print or type. This form may be completed and filed with the City Clerk at 276 Fourth Avenue, Chula Vista, CA 91910. See reverse side of form for additional information.

COMPLAINANT'S NAME Helen PROSSER		DAYTIME PHONE ()
COMPLAINANT'S ADDRESS	CITY	ZIP
LOCATION OF INCIDENT		ALTERNATE PHONE ()
NAME OF CITY OFFICIAL(S)		DATE AND TIME OF INCIDENT
NARRATIVE OF COMPLAINT <i>continued from Page 1</i>		
<p>OF INTEREST" with regard to matters of Republic Waste AND THE people of Chula Vista. the city council must MAKE DECISIONS ON placing liens ON default TRASH COLLECTION Bills. Who will Steve Represent? The citizens of Chula Vista OR the WASTE company he MANAGES?</p> <p>I believe it is in the best interest of the citizens of Chula Vista to have Steve Miesen's appointment to the CHULA VISTA CITY COUNCIL REVOKED!</p> <p>I ALSO think that the CITY ATTORNEY AND HIS STAFF, AS WELL AS THE CURRENT CITY COUNCIL should recuse themselves from Testifying in an EXAMINATION of the legality of the Miesen appointment due to their own PERSONAL bias, acceptance of CAMPAIGN CONTRIBUTIONS, AND OTHER gifts AND friendships.</p>		
CERTIFICATION: <input type="checkbox"/> CONTINUED ON ADDITIONAL SHEETS <input type="checkbox"/>		
I declare that the statements made on this form, as well as any attached statements of my own, are true and correct to the best of my knowledge and belief. This declaration is made under penalty of perjury, under the laws of the State of California.		
Signed: <u>Helen Prosser</u>		Date: <u>February 20, 2015</u>

EXHIBIT C

GOVERNMENT CODE

SECTION 1090-1099

1090. (a) Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

(b) An individual shall not aid or abet a Member of the Legislature or a state, county, district, judicial district, or city officer or employee in violating subdivision (a).

(c) As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

1090.1. No officer or employee of the State nor any Member of the Legislature shall accept any commission for the placement of insurance on behalf of the State.

1091. (a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

(2) That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the contracting party has been converted from one form of business

organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which existed before the transfer or change in organization. For purposes of this paragraph, stockholders, bondholders, partners, or other persons holding an interest in the contracting party are regarded as having the "real or ultimate ownership" of the contracting party.

(3) That of an employee or agent of the contracting party, if all of the following conditions are met:

(A) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.

(B) The contract is competitively bid and is not for personal services.

(C) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.

(D) The contracting party has 10 or more other employees.

(E) The employee or agent did not directly participate in formulating the bid of the contracting party.

(F) The contracting party is the lowest responsible bidder.

(4) That of a parent in the earnings of his or her minor child for personal services.

(5) That of a landlord or tenant of the contracting party.

(6) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm that renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(7) That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water.

(8) That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

(9) That of a person subject to the provisions of Section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965.

(10) Except as provided in subdivision (b) of Section 1091.5, that of a director of, or a person having an ownership interest of, 10 percent or more in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor or creditor.

(11) That of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. This paragraph applies only to an employee of a consulting firm who does not serve in a primary management capacity, and does not apply to an officer or director of a consulting firm.

(12) That of an elected officer otherwise subject to Section 1090, in any housing assistance payment contract entered into pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. Sec. 1437f) as amended, provided that the housing assistance payment contract was in existence before Section 1090 became applicable to

the officer and will be renewed or extended only as to the existing tenant, or, in a jurisdiction in which the rental vacancy rate is less than 5 percent, as to new tenants in a unit previously under a Section 8 contract. This section applies to any person who became a public official on or after November 1, 1986.

(13) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.

(14) That of a person owning less than 3 percent of the shares of a contracting party that is a for-profit corporation, provided that the ownership of the shares derived from the person's employment with that corporation.

(15) That of a party to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

(A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.

(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.

(16) That of a person who is an officer or employee of an investor-owned utility that is regulated by the Public Utilities Commission with respect to a contract between the investor-owned utility and a state, county, district, judicial district, or city body or board of which the person is a member, if the contract requires the investor-owned utility to provide energy efficiency rebates or other type of program to encourage energy efficiency that benefits the public when all of the following apply:

(A) The contract is funded by utility consumers pursuant to regulations of the Public Utilities Commission.

(B) The contract provides no individual benefit to the person that is not also provided to the public, and the investor-owned utility receives no direct financial profit from the contract.

(C) The person has recused himself or herself from all participation in making the contract on behalf of the state, county, district, judicial district, or city body or board of which he or she is a member.

(D) The contract implements a program authorized by the Public Utilities Commission.

(c) This section is not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which he or she is a member to enter into the contract.

(d) The willful failure of an officer to disclose the fact of his or her interest in a contract pursuant to this section is punishable as provided in Section 1097. That violation does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

1091.1. The prohibition against an interest in contracts provided by this article or any other provision of law shall not be deemed to prohibit any public officer or member of any public board or commission from subdividing lands owned by him or in which he has an interest and which subdivision of lands is effected under the provisions of Division 2 (commencing with Section 66410) of Title 7

of the Government Code or any local ordinance concerning subdivisions; provided, that (a) said officer or member of such board or commission shall first fully disclose the nature of his interest in any such lands to the legislative body having jurisdiction over the subdivision thereof, and (b) said officer or member of such board or commission shall not cast his vote upon any matter or contract concerning said subdivision in any manner whatever.

1091.2. Section 1090 shall not apply to any contract or grant made by local workforce investment boards created pursuant to the federal Workforce Investment Act of 1998 except where both of the following conditions are met:

(a) The contract or grant directly relates to services to be provided by any member of a local workforce investment board or the entity the member represents or financially benefits the member or the entity he or she represents.

(b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

1091.3. Section 1090 shall not apply to any contract or grant made by a county children and families commission created pursuant to the California Children and Families Act of 1998 (Division 108 (commencing with Section 130100) of the Health and Safety Code), except where both of the following conditions are met:

(a) The contract or grant directly relates to services to be provided by any member of a county children and families commission or the entity the member represents or financially benefits the member or the entity he or she represents.

(b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

1091.4. (a) As used in Section 1091, "remote interest" also includes a person who has a financial interest in a contract, if all of the following conditions are met:

(1) The agency of which the person is a board member is a special district serving a population of less than 5,000 that is a landowner voter district, as defined in Section 56050, that does not distribute water for any domestic use.

(2) The contract is for either of the following:

(A) The maintenance or repair of the district's property or facilities provided that the need for maintenance or repair services has been widely advertised. The contract will result in materially less expense to the district than the expense that would have resulted under reasonably available alternatives and review of those alternatives is documented in records available for public inspection.

(B) The acquisition of property that the governing board of the district has determined is necessary for the district to carry out its functions at a price not exceeding the value of the property, as determined in a record available for public inspection by an appraiser who is a member of a recognized organization of appraisers.

(3) The person did not participate in the formulation of the

contract on behalf of the district.

(4) At a public meeting, the governing body of the district, after review of written documentation, determines that the property acquisition or maintenance and repair services cannot otherwise be obtained at a reasonable price and that the contract is in the best interests of the district, and adopts a resolution stating why the contract is necessary and in the best interests of the district.

(b) If a party to any proceeding challenges any fact or matter required by paragraph (2), (3), or (4) of subdivision (a) to qualify as a remote interest under subdivision (a), the district shall bear the burden of proving this fact or matter.

1091.5. (a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties.

(3) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.

(4) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

(5) That of a tenant in a public housing authority created pursuant to Part 2 (commencing with Section 34200) of Division 24 of the Health and Safety Code in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to Part 1.7 (commencing with Section 34100) of Division 24 of the Health and Safety Code.

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

(7) That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that this interest is noted in its official records.

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated"

even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

(10) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

(11) Except as provided in subdivision (b), that of an officer or employee of, or a person having less than a 10-percent ownership interest in, a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower, depositor, debtor, or creditor.

(12) That of (A) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, prior to entering into the agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (B) any officer, director, or employee acting pursuant to the agreement on behalf of the nonprofit corporation. For purposes of this paragraph, "agreement" includes contracts and grants, and "park," "natural lands," and "historical resources" shall have the meanings set forth in subdivisions (d), (g), and (i) of Section 5902 of the Public Resources Code. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources.

(13) That of an officer, employee, or member of the Board of Directors of the California Housing Finance Agency with respect to a loan product or programs if the officer, employee, or member participated in the planning, discussions, development, or approval of the loan product or program and both of the following two conditions exist:

(A) The loan product or program is or may be originated by any lender approved by the agency.

(B) The loan product or program is generally available to qualifying borrowers on terms and conditions that are substantially the same for all qualifying borrowers at the time the loan is made.

(14) That of a party to a contract for public services entered into by a special district that requires a person to be a landowner or a representative of a landowner to serve on the board of which the officer or employee is a member, on the same terms and conditions as if he or she were not a member of the body or board. For purposes of this paragraph, "public services" includes the powers and purposes

generally provided pursuant to provisions of the Water Code relating to irrigation districts, California water districts, water storage districts, or reclamation districts.

(b) An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor.

1091.6. An officer who is also a member of the governing body of an organization that has an interest in, or to which the public agency may transfer an interest in, property that the public agency may acquire by eminent domain shall not vote on any matter affecting that organization.

1092. (a) Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless the contract is made in the official capacity of the officer, or by a board or body of which he or she is a member.

(b) An action under this section shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation described in subdivision (a).

1092.5. Notwithstanding Section 1092, no lease or purchase of, or encumbrance on, real property may be avoided, under the terms of Section 1092, in derogation of the interest of a good faith lessee, purchaser, or encumbrancer where the lessee, purchaser, or encumbrancer paid value and acquired the interest without actual knowledge of a violation of any of the provisions of Section 1090.

1093. (a) The Treasurer and Controller, county and city officers, and their deputies and clerks shall not purchase or sell, or in any manner receive for their own or any other person's use or benefit any state, county or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state, or any county or city thereof.

(b) An individual shall not aid or abet the Treasurer, Controller, a county or city officer, or their deputy or clerk in violating subdivision (a).

(c) This section shall not apply to evidences of indebtedness issued to or held by an officer, deputy, or clerk for services rendered by them, nor to evidences of the funded indebtedness of the state, county, or city.

1094. Every officer whose duty it is to audit and allow the accounts of other state, county, or city officers shall, before allowing such accounts, require each of such officers to make and file with him an affidavit or certificate under penalty of perjury

that he has not violated any of the provisions of this article, and any individual who wilfully makes and subscribes such certificate to an account which he knows to be false as to any material matter shall be guilty of a felony and upon conviction thereof shall be subject to the penalties prescribed for perjury by the Penal Code of this State.

1095. Officers charged with the disbursement of public moneys shall not pay any warrant or other evidence of indebtedness against the State, county, or city when it has been purchased, sold, received, or transferred contrary to any of the provisions of this article.

1096. Upon the officer charged with the disbursement of public moneys being informed by affidavit that any officer, whose account is about to be settled, audited, or paid by him, has violated any of the provisions of this article, the disbursing officer shall suspend such settlement or payment, and cause the district attorney to prosecute the officer for such violation. If judgment is rendered for the defendant upon such prosecution, the disbursing officer may proceed to settle, audit, or pay the account as if no affidavit had been filed.

1097. (a) Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of those laws, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

(b) An individual who willfully aids or abets an officer or person in violating a prohibition by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

1097.1. (a) The Commission shall have the jurisdiction to commence an administrative action, or a civil action, as set forth within the limitations of this section and Sections 1097.2, 1097.3, 1097.4, and 1097.5, against an officer or person prohibited by Section 1090 from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who violates any provision of those laws or who causes any other person to violate any provision of those laws.

(b) The Commission shall not have jurisdiction to commence an administrative or civil action or an investigation that might lead to an administrative or civil action pursuant to subdivision (a) against a person except upon written authorization from the district attorney of the county in which the alleged violation occurred. A

civil action alleging a violation of Section 1090 shall not be filed against a person pursuant to this section if the Attorney General or a district attorney is pursuing a criminal prosecution of that person pursuant to Section 1097.

(c) (1) The Commission's duties and authority under the Political Reform Act of 1974 (Title 9 (commencing with Section 81000)) to issue opinions or advice shall not be applicable to Sections 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, 1091.5, 1091.6, or 1097, except as provided in this subdivision.

(2) A person subject to Section 1090 may request the Commission to issue an opinion or advice with respect to his or her duties under Section 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, 1091.5, and 1091.6. The Commission shall decline to issue an opinion or advice relating to past conduct.

(3) The Commission shall forward a copy of the request for an opinion or advice to the Attorney General's office and the local district attorney prior to proceeding with the advice or opinion.

(4) When issuing the advice or opinion, the Commission shall either provide to the person who made the request a copy of any written communications submitted by the Attorney General or a local district attorney regarding the opinion or advice, or shall advise the person that no written communications were submitted. The failure of the Attorney General or a local district attorney to submit a written communication pursuant to this paragraph shall not give rise to an inference that the Attorney General or local district attorney agrees with the opinion or advice.

(5) The opinion or advice, when issued, may be offered as evidence of good faith conduct by the requester in an enforcement proceeding, if the requester truthfully disclosed all material facts and committed the acts complained of in reliance on the opinion or advice. Any opinion or advice of the Commission issued pursuant to this subdivision shall not be admissible by any person other than the requester in any proceeding other than a proceeding brought by the Commission pursuant to this section. The Commission shall include in any opinion or advice that it issues pursuant to this subdivision a statement that the opinion or advice is not admissible in a criminal proceeding against any individual other than the requester.

(d) A decision issued by the Commission pursuant to an administrative action commenced pursuant to the jurisdiction established in subdivision (a) shall not be admissible in any proceeding other than a proceeding brought by the Commission pursuant to this section. The Commission shall include in any decision it issues pursuant to an administrative action commenced pursuant to the jurisdiction established in subdivision (a) a statement that the decision applies only to proceedings brought by the Commission.

(e) The Commission may adopt, amend, and rescind regulations to govern the procedures of the Commission consistent with the requirements of this section and Sections 1097.2, 1097.3, 1097.4, and 1097.5. These regulations shall be adopted in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2).

(f) For purposes of this section and Sections 1097.2, 1097.3, 1097.4, and 1097.5, "Commission" means the Fair Political Practices Commission.

1097.2. (a) Upon the sworn complaint of a person or on its own initiative, the Commission shall investigate possible violations of Section 1090, as provided in Section 1097.1. After complying with subdivision (b) of Section 1097.1, the Commission shall provide a written notification to the person filing a complaint in the manner

described in Section 83115.

(b) The Commission shall not make a finding of probable cause to believe Section 1090 has been violated unless the Commission has notified the person who is alleged to have violated Section 1090 in the manner described in Section 83115.5.

(c) If the Commission determines there is probable cause to believe Section 1090 has been violated, it may hold a hearing to determine if a violation has occurred, subject to the requirements of subdivision (b) of Section 1097.1 and in the manner described in Section 83116.

(d) If the Commission rejects the decision of an administrative law judge made pursuant to Section 11517, the Commission shall state the reasons in writing for rejecting the decision, as required by Section 83116.3.

(e) The Commission shall have all of the subpoena powers provided in Section 83118 to assist in the performance of the Commission's duties under this section.

(f) The Commission may refuse to excuse any person from testifying, or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Commission notwithstanding an objection that the testimony or evidence required of the person may tend to incriminate the person. A person who is compelled, after having claimed the privilege against self-incrimination, to testify or produce testimonial evidence, shall not have that testimony or the testimonial evidence the person produced used against that person in a separate and subsequent prosecution. However, the individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The Commission shall not compel any person to testify or produce testimonial evidence after the person has claimed the privilege against self-incrimination unless the Commission has obtained written authorization from the Attorney General and the district attorney of the county in which the alleged violation occurred.

(g) The Commission shall not commence an administrative action pursuant to this section against a person who is subject to Section 1090 alleging a violation of that section if the Commission has commenced a civil action pursuant to Section 1097.3 against that person for the same violation. For purposes of this subdivision, the commencement of the administrative action shall be the date of the service of the probable cause hearing notice, as required by subdivision (b), upon the person alleged to have violated Section 1090.

(h) An administrative action brought pursuant to this section shall be subject to the requirements of Section 91000.5.

1097.3. (a) Subject to the requirements of Section 1097.1, the Commission may file a civil action for an alleged violation of Section 1090. A person held liable for such a violation shall be subject to a civil fine payable to the Commission for deposit in the General Fund of the state in an amount not to exceed the greater of ten thousand dollars (\$10,000) or three times the value of the financial benefit received by the defendant for each violation.

(b) The Commission shall not commence a civil action pursuant to this section alleging a violation of Section 1090 if the Commission has commenced an administrative action pursuant to Section 1097.1 against the person for the same violation.

(c) A civil action brought by the Commission pursuant to this

section shall not be filed more than four years after the date the violation occurred.

1097.4. In addition to any other remedies available, the Commission may obtain a judgment in superior court for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to Section 1097.1, 1097.2, or 1097.3. Penalties shall be collected in accordance with Section 91013.5.

1097.5. (a) If the time for judicial review of a final Commission order or decision issued pursuant to Section 1097.2 has lapsed, or if all means of judicial review of the order or decision have been exhausted, the Commission may apply to the clerk of the superior court for a judgment to collect the penalties imposed by the order or decision, or the order as modified in accordance with a decision on judicial review.

(1) The application, which shall include a certified copy of the order or decision, or the order as modified in accordance with a decision on judicial review, and proof of service of the order or decision, constitutes a sufficient showing to warrant issuance of the judgment to collect the penalties. The clerk of the court shall enter the judgment immediately in conformity with the application.

(2) An application made pursuant to this section shall be made to the clerk of the superior court in the county where the monetary penalties, fees, or civil penalties were imposed by the Commission.

(3) A judgment entered in accordance with this section has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action and may be enforced in the same manner as any other judgment of the court in which it is entered.

(4) The Commission may bring an application pursuant to this section only within four years after the date on which the monetary penalty, fee, or civil penalty was imposed.

(b) The remedy available under this section is in addition to those available under Section 1097.4 or any other law.

1098. (a) Any current public officer or employee who willfully and knowingly discloses for pecuniary gain, to any other person, confidential information acquired by him or her in the course of his or her official duties, or uses any such information for the purpose of pecuniary gain, is guilty of a misdemeanor.

(b) As used in this section:

(1) "Confidential information" means information to which all of the following apply:

(A) At the time of the use or disclosure of the information, the information is not a public record subject to disclosure under the Public Records Act.

(B) At the time of the use or disclosure of the information, the disclosure is prohibited by (i) a statute, regulation, or rule which applies to the agency in which the officer or employee serves; (ii) the statement of incompatible activities adopted pursuant to Section 19990 by the agency in which the officer or employee serves; or (iii) a provision in a document similar to a statement of incompatible activities if the agency in which the officer or employee serves is a local agency.

(C) The use or disclosure of the information will have, or could

reasonably be expected to have, a material financial effect on any investment or interest in real property which the officer or employee, or any person who provides pecuniary gain to the officer or employee in return for the information, has at the time of the use or disclosure of the information or acquires within 90 days following the use or disclosure of the information.

(2) For purposes of paragraph (1):

(A) "Interest in real property" has the definition prescribed by Section 82033.

(B) "Investment" has the definition prescribed by Section 82034.

(C) "Material financial effect" has the definition prescribed by Sections 18702 and 18702.2 of Title 2 of the California Administrative Code, as those sections read on September 1, 1987.

(3) "Pecuniary gain" does not include salary or other similar compensation from the officer's or the employee's agency.

(c) This section shall not apply to any disclosure made to any law enforcement agency, nor to any disclosure made pursuant to Sections 10542 and 10543.

(d) This section is not intended to supersede, amend, or add to subdivision (b) of Section 8920 regarding prohibited conduct of Members of the Legislature.

1099. (a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:

(1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.

(2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.

(3) Public policy considerations make it improper for one person to hold both offices.

(b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to Section 803 of the Code of Civil Procedure.

(c) This section does not apply to a position of employment, including a civil service position.

(d) This section shall not apply to a governmental body that has only advisory powers.

(e) For purposes of paragraph (1) of subdivision (a), a member of a multimember body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.

(f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices.

XIV. CODE OF ETHICS

Government Code Section 8920 et seq.¹⁸

A. The Basic Prohibition

Government Code section 8920, the Code of Ethics, applies to state elected and appointed officers. It does not apply to civil service employees. The Code of Ethics generally prohibits officers from participating in decisions that will have a direct monetary effect on them.

Specifically, the Code of Ethics prohibits officers from: (1) having any direct or indirect financial interest, or (2) engaging in any business transaction or professional activity, or (3) incurring any financial obligation, which is in substantial conflict with the proper discharge of the official's duties. (§ 8920, subd. (a).)

A substantial conflict arises when an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity. Where the officer will be so affected by a decision, the officer should disqualify himself or herself from the decision. A substantial conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (§ 8921.)

B. Special Rules for Legislative Officials

Briefly summarized, the Code of Ethics prohibits legislators and legislative employees from doing the following:

1. Accepting employment that the legislator or legislative employee has reason to believe would impair his or her independent judgment as to official duties or that would induce the legislator or legislative employee to disclose confidential information acquired by him or her in the course of, and by reason of, official duties. (§ 8920, subd. (b)(1).)

2. Willfully and knowingly disclosing confidential information acquired in the course of and by reason of his or her official duties or using that information for pecuniary gain. (§ 8920, subd. (b)(2).)

3. In general, accepting or agreeing to accept, or being in partnership with any person who accepts or agrees to accept, any employment, fee, or other thing of monetary value, in consideration of his or her appearing, agreeing to appear, or taking any action on behalf of another person before any state board or agency. Exceptions to this prohibition include the following: attorney representation before any court; representation before the Workers' Compensation Appeals Board; inquiries on behalf of constituents; advocacy without compensation; intervention on behalf of others to require a state board or agency to perform a

¹⁸ All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

ministerial, non-discretionary act; advocacy on behalf of the legislator or legislative employee himself or herself; and, receipt of partnership or firm compensation, if the legislator or legislative employee does not share either directly or indirectly in any fee, less any expenses attributable to the fee resulting from the transaction. (§ 8920, subd. (b)(3).)

4. Receiving or agreeing to receive anything of value for services in connection with the legislative process. (§ 8920, subd. (b)(4).)

5. Participating, by taking any action, on the floor of either house or in committee or elsewhere, in the passage or defeat of legislation in which a legislator or legislative employee has a personal interest, except as follows:

Disclosure

If the Member files a statement disclosing his or her personal interest to be entered on the journal, and states that he or she is able to cast a fair and objective vote, he or she may vote for the final passage of the legislation.

Nondisclosure

The Member may be excused from disclosing his or her personal interest in legislation and from voting for the final passage of that legislation, without any entry in the journal if the Member believes that he or she should abstain from voting and he or she informs the presiding officer prior to the commencement of the vote. (§ 8920, subd. (b)(5).)

C. Penalties and Enforcement

Knowing and willful violations are punishable as misdemeanors, and any person who conspires to violate these provisions may be guilty of a felony. (§ 8926.)

EXHIBIT D

XIV. CODE OF ETHICS

Government Code Section 8920 et seq.¹⁸

A. The Basic Prohibition

Government Code section 8920, the Code of Ethics, applies to state elected and appointed officers. It does not apply to civil service employees. The Code of Ethics generally prohibits officers from participating in decisions that will have a direct monetary effect on them.

Specifically, the Code of Ethics prohibits officers from: (1) having any direct or indirect financial interest, or (2) engaging in any business transaction or professional activity, or (3) incurring any financial obligation, which is in substantial conflict with the proper discharge of the official's duties. (§ 8920, subd. (a).)

A substantial conflict arises when an official expects to derive a direct monetary gain or suffer a direct monetary loss by reason of his or her official activity. Where the officer will be so affected by a decision, the officer should disqualify himself or herself from the decision. A substantial conflict does not exist if an official accrues no greater benefit or detriment as a member of a business, profession, occupation or group than any other member. (§ 8921.)

B. Special Rules for Legislative Officials

Briefly summarized, the Code of Ethics prohibits legislators and legislative employees from doing the following:

1. Accepting employment that the legislator or legislative employee has reason to believe would impair his or her independent judgment as to official duties or that would induce the legislator or legislative employee to disclose confidential information acquired by him or her in the course of, and by reason of, official duties. (§ 8920, subd. (b)(1).)

2. Willfully and knowingly disclosing confidential information acquired in the course of and by reason of his or her official duties or using that information for pecuniary gain. (§ 8920, subd. (b)(2).)

3. In general, accepting or agreeing to accept, or being in partnership with any person who accepts or agrees to accept, any employment, fee, or other thing of monetary value, in consideration of his or her appearing, agreeing to appear, or taking any action on behalf of another person before any state board or agency. Exceptions to this prohibition include the following: attorney representation before any court; representation before the Workers' Compensation Appeals Board; inquiries on behalf of constituents; advocacy without compensation; intervention on behalf of others to require a state board or agency to perform a

¹⁸ All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

ministerial, non-discretionary act; advocacy on behalf of the legislator or legislative employee himself or herself; and, receipt of partnership or firm compensation, if the legislator or legislative employee does not share either directly or indirectly in any fee, less any expenses attributable to the fee resulting from the transaction. (§ 8920, subd. (b)(3).)

4. Receiving or agreeing to receive anything of value for services in connection with the legislative process. (§ 8920, subd. (b)(4).)

5. Participating, by taking any action, on the floor of either house or in committee or elsewhere, in the passage or defeat of legislation in which a legislator or legislative employee has a personal interest, except as follows:

Disclosure

If the Member files a statement disclosing his or her personal interest to be entered on the journal, and states that he or she is able to cast a fair and objective vote, he or she may vote for the final passage of the legislation.

Nondisclosure

The Member may be excused from disclosing his or her personal interest in legislation and from voting for the final passage of that legislation, without any entry in the journal if the Member believes that he or she should abstain from voting and he or she informs the presiding officer prior to the commencement of the vote. (§ 8920, subd. (b)(5).)

C. Penalties and Enforcement

Knowing and willful violations are punishable as misdemeanors, and any person who conspires to violate these provisions may be guilty of a felony. (§ 8926.)
